

Cunningham
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Logistical Support, Inc.

File: B-244155

Date: September 16, 1991

Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for the protester.
Ginger Dolan, Esq., Naval Supply Systems Command, Department of the Navy, for the agency.
James Cunningham, Esq., Glenn Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will not consider protest involving alleged violation of policy letter issued by the Office of Federal Procurement Policy which establishes executive branch policy regarding the definition of service contract requirements.
2. Solicitation statement of minimum manning levels does not restrict competition where solicitation permits offerors to deviate from the stated levels and explain the basis for the deviation.
3. Protest that solicitation's minimum manning levels exceed the agency's minimum needs is denied where agency estimate is reasonably based on agency's past contract experience.

DECISION

Logistical Support, Inc. (LSI) protests the minimum manning requirements of request for proposals (RFP) No. N00612-91-R-0220, issued by the Naval Supply Center, Charleston, South Carolina, for mess attendant services at the Marine Corps Air Station, Beaufort, South Carolina. LSI protests that: the minimum manning requirement violates Office of Federal Procurement Policy (OFPP) policy letter 91-2, which requires agencies to use performance-based descriptions of work in solicitations for service contracts; the minimum manning requirement restricts competition; and the number of manhours stated does not reflect the agency's actual needs.

We dismiss the protest in part and deny it in part.

The RFP, issued on May 7, 1991, provided for the award of a firm, fixed-price contract to provide mess attendant services for a base year period and 4 option years. The RFP included a minimum manning clause which stated, in relevant part:

"The government has established the following minimum manning:

Weekdays	256 manhours per day
Weekend/Holidays	147 manhours per day

Proposals offering less than the minimum will be rejected as unrealistic unless the firm proposes an alternate (fully explained) proposal that will fully satisfy the needs of the government." (Emphasis added.)1/

LSI first protests that the minimum manning clause in the RFP conflicts with the provisions of OFPP policy letter 91-2 which provides that agencies should draft solicitations that advise offerors "what" is required, not "how" the work is to be accomplished.2/ Essentially, LSI argues that the minimum manning requirement in this RFP violates OFPP policy letter 91-2 in that it tells contractors "how" to perform the contract.

1/ The RFP was subsequently amended to decrease the prescribed staffing levels to 175 hours on weekdays and 140 hours on weekend days.

2/ In its protest, LSI mistakenly referred to OFPP policy letter 91-1 which has no relevance to the issues raised in its protest. OFPP policy letter 91-2 provides in pertinent part:

"It is the policy of the Federal Government that (1) agencies use performance-based contracting methods to the maximum extent practicable when acquiring services. . . . Performance-based contracting methods consist of the following: . . . when preparing statements of work, agencies shall, to the maximum extent practicable, describe the work in terms of 'what' is to be the required output rather than 'how' the work is to be accomplished." (Emphasis added.)

OFPP policy letter 91-2 was issued on April 9, 1991, effective 30 days after issuance. The policy letter provided that the Federal Acquisition Regulatory Council should promulgate implementing regulations in the first Federal Acquisition Circular issued 120 days after the effective date of the policy letter. Implementing regulations have not yet been promulgated.^{3/}

The Competition in Contracting Act of 1984 (CICA) authorizes this Office to consider a protest concerning "an alleged violation of procurement statute or regulation," 31 U.S.C. § 3552 (1988). Executive branch policy directives are not statutes or regulations and therefore questions regarding compliance with such directives are not within our bid protest jurisdiction. See, e.g., Services Alliance Sys., Inc., B-243306, Mar. 18, 1991, 91-1 CPD ¶ 297; American Council of Indep. Laboratories, Inc., B-223820, Aug. 7, 1986, 86-2 CPD ¶ 169; Kramer Assocs., Inc., B-197178, July 16, 1980, 80-2 CPD ¶ 33. Since the OFPP policy letter merely establishes executive branch policy regarding the use of performance requirements in defining contract requirements, an alleged violation of that policy letter is not for review by our Office. To the extent LSI's protest is based on an alleged violation of the OFPP policy letter, it is dismissed.

LSI next protests that the RFP's minimum manning requirement restricts competition because it "takes away all incentive for contractors to be innovative, efficient or cost-effective," and seeks to have the provision deleted on that basis. In this regard, LSI's argument is inconsistent with the express terms of the RFP. The RFP specifically permits offerors to submit proposals based on manning levels lower than those stated in the RFP, provided the offeror submits an "alternate (fully explained) proposal that will fully satisfy the needs of the government." The opportunity to submit an alternate proposal relying on manning levels other than those stated appears to be precisely the opportunity LSI seeks by requesting that the minimum manning levels be deleted.

LSI also argues that the statement of minimum manhours restricts competition since all offerors will propose nearly the same number of manhours and the only basis for distinguishing among offerors will be the differing general

^{3/} In the supplementary material accompanying publication of the policy letter in the Federal Register, OFPP acknowledged that "premature agency implementation may result in confusion and duplicative effort," and accordingly, stated that the policy letter was intended to "encourage, rather than require immediate implementation by agencies." 56 Fed. Reg. 15110 (1991).

and administrative expenses (G&A) and proposed profits. As discussed above, offerors are not required to propose the stated minimum manhours. Under these circumstances, we find no merit in LSI's assertion that the solicitation restricts competition.

Finally, LSI protests that the number of manhours contained in the RFP does not reflect the agency's actual needs. LSI declines to state what it believes the proper staffing level should be, stating that "LSI does not offer any [alternative] proposed manning as the same is not necessary and LSI's only relief sought is to have minimum manning levels completely removed from the solicitation."4/

The responsibility for drafting specifications that reflect the minimum needs of the government is primarily that of the contracting agency, and we will not question specifications in the absence of a showing that they do not reflect the agency's minimum needs. Robertson & Penn, Inc., B-223945, Oct. 30, 1986, 86-2 CPD ¶ 497. In the absence of evidence clearly establishing a substantial adverse impact on competition, our Office has specifically found the use of minimum manning requirements permissible. Id.

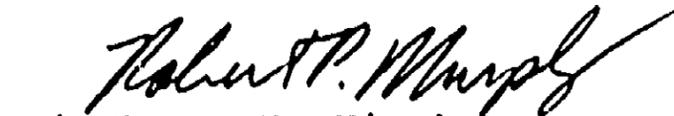
As initially issued, the RFP required offerors to submit proposed minimum staffing charts (256 hours for weekdays and 147 workhours per day for weekends and holidays). As a result of further study of current and anticipated staffing needs, the Navy amended the RFP to decrease the required staffing to 175 hours (weekdays) and 140 hours (weekends). Specifically, the Navy states that the amended staffing resulted from an on-site review and study of the incumbent contractor's current staffing levels and hours worked. The Navy also states that

4/ LSI did point out minor clerical errors in the agency's calculation of the minimum manning hours. In its report responding to the protest, the agency stated that it is correcting these errors. In commenting on the agency report, LSI's counsel submitted a request for costs, on the grounds that the agency took corrective action due to its protest, pursuant to our regulations found at 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6(e)). An agency's corrective action, taken early in the protest process, is precisely the kind of prompt action our regulations are designed to encourage. See Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 70 Comp. Gen. _____, 91-1 CPD ¶ 558. Accordingly, the agency's action here provides no basis for awarding costs. Id.

its review of the minimum staffing requirements represented the Navy's attempt to deal with past problems of underbid mess attendant contracts resulting in unsatisfactory performance and chronic contract administration problems.

Other than disagreeing with the various aspects of the government's calculation of the minimum staffing necessary, LSI has not demonstrated that the staffing level is unreasonable. As discussed above, if LSI believes that the agency's actual needs can better be met using an alternative staffing plan, the RFP expressly permits it to submit an alternate proposal explaining how its alternative approach will fully satisfy the agency's needs. Under these circumstances, we find no basis for objection to the statement of minimum staffing requirements in the RFP. Accordingly, LSI's protest that the stated manning requirements exceed the agency's actual needs is denied. See John F. Kenefick Photogrammetric Consultant, Inc., B-238384, May 4, 1990, 90-1 CPD ¶ 452.

We dismiss the protest in part and deny it in part.


for James F. Hinchman
General Counsel